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FILED

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SECRETARY, BOARD OF
OIL, GAS & MINING

IN AND BEFORE THE UTAH STATE DIVISION
OF OIL, GAS, AND MINING

In the Matter of the Potential
Pattern of Violations and
Related Issues, Co-Op Mining
Company, Bear Canyon Mine,
Emery County, Utah,
ACT/015/025

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: Petition to Intervene
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Castle Valley Special Service District ("Petitioner"), by and through its counsel, Appel & Mattsson, hereby petitions the Division of Oil, Gas and Mining ("DOGM") to allow it to intervene in the above-referenced matters.

BACKGROUND

1. Petitioner is a local government agency that provides culinary water service to Huntington, Cleveland and Elmo, Utah. Petitioner provides water for approximately 1,060 connections and 2,730 people from waters in the proximity of Co-Op's mining operations, including Big Bear Canyon Springs and the waters in Huntington Creek. Petitioner's ability to provide culinary water service has and will continue to be impacted by Co-Op's continued

violations of mining laws.

2. The DOGM has been gathering information concerning Co-Op's "pattern of violations", cited Co-Op this year for such ongoing violations and commenced administrative proceedings against Co-Op.

3. These citations for "patterns of violations" have a direct bearing upon Petitioner's ability to provide safe culinary water service to an entire rural community. These include: N91-35-1-1 for failure to conduct mining and reclamation activities in accordance with the approved permit, including failure to prevent additional contributions of suspended solids to streamflow outside the permit area and otherwise prevent water pollution; N91-20-1-1 for failure to comply with the terms and conditions of the approved mining and reclamation plan; and N91-26-7-2 (#2) for conducting mining and reclamation operations without a valid coal mining permit including failure to construct proper drainage controls. The DOGM also reviewed other Co-Op violations including N91-26-7-2 (#1), N91-35-8-1, N90-35-1-1, N90-25-1-1 and N91-26-4-3(31). All of the violations may detrimentally impact Petitioner's water supply.

4. For many years Petitioner has filed objections with the DOGM and others expressing their concern about the adverse impact of Co-Op's mining operations and practices on their water sources.

5. As far back as 1979 Petitioner contacted the DOGM to express its concern that Co-Op's mining activities in the Bear Creek Canyon Portal Mine would contaminate the Huntington community's major culinary water source.

6. Since that time, Petitioner has been actively involved in the process of attempting to monitor the impact of Co-Op's mining activities on its water supply.

7. In March of 1991, Petitioner protested Co-Op's renewal application and application for a new mining permit because of its concerns that Co-Op's current and proposed mining operations were adversely impacting their water supply.

8. On July 8, 1992, the DOGM held an informal hearing concerning the potential patterns of violations of Co-Op including Notices of Violation N91-35-1-1, N91-20-1-1 and N91-26-7-2(#2).

9. On October 28, 1992, an Order to Show Cause Hearing concerning Co-Op's pattern of violations was held by the DOGM. Petitioner's counsel was present.

10. The next hearing concerning these issues is scheduled for December 18, 1992. Briefs are due on December 10, 1992.

11. Petitioner therefore seeks permission from the DOGM to intervene in pending matters concerning Co-Op in order that Petitioner may actively protect its water source from Co-Op's mining law violations.

ARGUMENT

I.

Petitioner Should be Allowed to Intervene in the Above-Referenced Matter

Under any one of many theories, Petitioner should be allowed to intervene in the above-referenced matter. The grounds for such a request include--the Utah Administrative Code, federal law and Utah law.

**A. Utah's Administrative Code (R645) Allows
for the Intervention of Petitioner
in the Above-Referenced Matter**

Although Utah's Coal Mining Rules do not specifically address the subject of intervention in a "pattern of violations"¹ situation, the rules both allow and require public notice and participation in a variety of subjects and issues. Co-Op's alleged pattern of violations and the associated proceedings warrant the intervention and direct involvement of Petitioner in the administrative process in order that it may protect their water source. First, Petitioner is a "person having an interest in the proceedings." According to R645-100-200, a:

"Person Having an Interest Which Is or May Be Adversely Affected or Person with a Valid Legal Interest" means any person (a) who uses any resource of economic, recreational, aesthetic, or environmental value that may be adversely affected by coal exploration or coal mining and reclamation operation or any related action of the Division, or the Board, or (b) whose property is or may be adversely affected by coal exploration or coal mining and reclamation operations or any related action of the Division of the Board.

Petitioner is the provider of domestic water to an entire rural community. The sources for their water are impacted directly by Co-Op's mining operations and are further jeopardized by Co-Op's repetitious violations of the mining rules. Petitioner, therefore, qualifies as a "person having an interest" or who are "adversely affected" by Co-Op's mining operations.

The theme of "interested" or "affected" persons runs throughout the coal mining rules which further suggests the DOGM's recognition of the importance of giving persons such as Petitioner

¹ R645-400-332.

notice of relevant events, as well as allowing them to participate in pertinent proceedings. For example, R645-103-421 states that: "[a]ny person having an interest which is or may be adversely affected has the right to petition the Board to have an area designated as unsuitable for coal mining and reclamation operations, or to have an existing designation terminated. . . ."

R645-303-330 similarly provides that "[a]ny person having an interest which is or may be adversely affected by a decision on the transfer, assignment, or sale of permit rights . . . may submit written comments on the application to the Division . . ."

R645-400-241 provides that "[a]ny person who is or may be adversely affected by coal exploration or coal mining and reclamation operations may ask the Director to review informally an authorized representative's decision not to inspect or take appropriate enforcement with respect to any violation alleged by that person . . .". This section is particularly important since it gives persons such as Petitioner the right to oversee and ensure that violations of mining rules are being enforced. Petitioner's involvement in the present proceeding would further this cause.

**B. Analogous Federal Law Allows for the Intervention
of Petitioner in Similar Circumstances
to the Present Facts**

Federal law and case law interpreting federal mining law draw upon intervention requirements similar to those found in the Utah Administrative Code. They require that intervenors have an interest in the proceedings and that their rights may be adversely affected.

For instance, in National Wildlife Federation v. Interior Department, 119 FED 3665 (June 1, 1987), the court held that coal mining trade associations could intervene in an action brought by environmental groups against Federal and Kentucky officials for failure to enforce the Surface Mining Control and Reclamation Act. In allowing the intervention, the court drew upon Federal Rule of Civil Procedure 24(a)(2):

Federal Rule of Civil Procedure 24(a)(2) establishes a threefold test for nonstatutory intervention as of right: first, a motion to intervene must be timely; second, intervenors must have a significantly protectable interest relating to the subject of the action that might be impaired if the action were decided without their participation; third, intervenors must show that their interest may be inadequately represented by existing parties. . . .

It is clear that, as member and mining operators, the intervenors have a significant protectable interest in the subject matter of this proceeding and adverse disposition would impair that interest. . . . The first two prongs of the test are therefore satisfied. . . .

As plaintiffs have raised several issues in which the industry intervenors have taken adverse positions [to the Secretary] regarding the scope of SMCRA and as participation by the industry intervenors with the Secretary's defense is likely to serve as a vigorous and helpful supplement, then the third prong has been satisfied as well.

Id. at 3666.

Similarly, Petitioner meets all three prongs of Federal Rule 26(a)(2). Petitioner has made a timely application; Petitioner has significant protectable interest relating to Co-Op's mining operations and its "pattern of violations"; Petitioner needs to be directly involved in the proceedings to ensure that its interests are protected. See also, James E. Leber v. George Sterling, 107 BD 1505 (April 26, 1984) (state regulatory authority was permitted to

intervene as a party respondent in an employee discrimination proceeding); In re: Permanent Surface Mining Litigation II, 46 FED 1472 (October 28, 1983) (coal industry group was allowed to intervene as a party defendant in an action challenging OSM regulations); Gateway Coal Company v. OSM, 131 BD 2046 (January 25, 1985) (intervenor is a full party to the proceeding and entitled to prove that there has been a violation); National Wildlife Federation v. Hodel, 106 FED 3309 (June 1, 1987) (coal industry associations were allowed to intervene as of right as party defendants in citizen suit brought against the Secretary of Interior).

In Rebel Coal Co. Inc. and Island Creek Coal Co., 63 BD 390 (June 24, 1982), the court held that an environmental group could not intervene in a permit revocation and suspension proceeding since it failed to show injury in fact. However, had the court been faced with the instant facts it would have allowed Petitioner to intervene:

The activity at issue in the section 521(a)(4) proceeding below has taken place in the watershed of the Trace Fork on the Guyandotte River, an area distinct from Tug Valley, which is the geographic area of concern to TVRC. If and when the respondent coal companies seek permission to mine in Tug Valley, TVRC and/or its members will have opportunities to influence whether such permission is granted and, if granted, the terms thereof. Assuming a permit were granted and operations begun, TVRC and/or its members would have the opportunity to bring any violations by respondents and failure of the regulatory authority to enforce to the attention of the Secretary and to compel compliance in Federal district court.

Id. at 393.

In the instant case, Co-Op's mining activities are taking place in Petitioner's watershed, not in a distant watershed. Therefore

Petitioner must be allowed to intervene.

All of these cases offer further support for Petitioner's request that it be allowed to intervene in matters concerning Co-Op's "pattern of violations" and others impacting its water supply. All of the violations cited by the DOGM against Co-Op directly impact Petitioner's ability to provide safe water service to its water users.

**C. Utah's Law on Intervention Offers
Another Reason to Support Petitioner's Request**

According to Utah Rule of Civil Procedure 24(a),

Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impeded his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Although the Utah Rules of Civil Procedure are not generally applicable to an administrative proceeding, Rule 24(a) is useful in providing the rationale for allowing intervention. As the Rule requires, Petitioner has an interest relating to Co-Op's mining activities--protecting their water supply from irreparable contamination--and this right may not be adequately protected without Petitioner's direct involvement in proceedings concerning Co-Op's patterns of violations and related matters. The "patterns of violations" direct impact Co-Op's water rights as they concern Co-Op's failure to adequately protect water supplies from their mining activities. Not only are Co-Op's past violations impacting Petitioner's water, its present activities pose a similar risk.


For example, on October 19, 1992, Pamela Grubaugh-Littig, permit supervisor with the DOGM, wrote a letter to Co-Op Mining Company stating that "[i]n its present form this amendment can not be approved. Of primary concern is the encroachment of the Bear Creek stream buffer zone, which has not been addressed. Specifics of the leach filed and the water source for the shower house also need to be discussed."

CONCLUSION

Petitioner must be allowed to intervene in proceedings concerning Co-Op's "patterns of violations" and related matters. As required by Utah's Administrative Code and Mining Rules, Petitioner is an interested party whose rights and interests are directly affected by Co-Op's mining operations, practices and violations. Petitioner must be allowed to actively participate in the administrative process in order to have an active role in protecting its water rights from irreparable damage.

WHEREFORE, Petitioner requests that it be allowed to intervene in proceedings concerning Co-Op's "patterns of violations" and related matters.

Respectfully submitted this 7th day of December, 1992.


Jeffrey W. Appel
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Attorneys for Petitioner

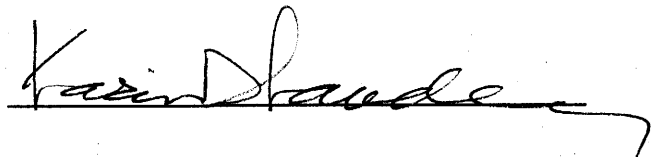
CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 7th day of December, 1992, true and correct copies of the foregoing Petition to Intervene filed by Castle Valley Special Service District was hand-delivered to the following:

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A handwritten signature in cursive script, appearing to read "Karin Hauke", is written over a horizontal line.